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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY JOSEPH SEEBOTH, Defendant and Appellant.	F078203 (Super. Ct. No. F17900441) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. John N. Gallagher, Jr., Judge. (Retired Judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P. J., Detjen, J. and Snauffer, J.

Appellant Timothy Joseph Seeboth pled guilty to possession of child pornography with a prior conviction (Pen. Code, § 311.11, subd. (b))[1] and admitted allegations that he had five prior convictions within the meaning of the "Three Strikes" law (§ 667, subd. (b)-(i)). Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

FACTUAL AND PROCEDURAL HISTORY[2]

Seeboth was a patient at Coalinga State Hospital (CSH), who was committed there as a sexually violent predator (SVP) (Welf. & Inst. Code, § 6604). On October 27, 2014, during a patient count, numerous electronic storage media and equipment with storage capacity were confiscated from Seeboth after psychiatric technician Adetomiloye Adepoju saw what she believed was child pornography on his laptop.

On May 9, 2016, a search warrant was obtained that authorized the search of the items confiscated from Seeboth. During a subsequent examination of the laptop, a sheriff's detective found at least four child pornography videos and 438 child pornography images with over 10 images depicting children under the age of 12.[3]

On January 31, 2017, the Fresno County District Attorney filed a complaint charging Seeboth with possession of child pornography with a prior and having five convictions within the meaning of the Three Strikes law.

On November 14, 2017, defense counsel filed a motion to suppress that challenged the warrantless seizure of digital media and other items seized from Seeboth but did not

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1 All further statutory references are to the Penal Code unless otherwise noted.

2 On January 28, 2019, Seeboth filed a request for judicial notice of the exhibits that were attached to his petition for a writ of habeas corpus in case No. F074285 that he filed in this court on August 31, 2016 (*In re Seeboth* (Sept. 30, 2016) [nonpub. order]). Seeboth's request for judicial notice is denied.

3 Seeboth was 69 years old when he committed the underlying offense in this matter.

directly challenge the search of the seized media that was conducted pursuant to the search warrant issued on May 9, 2016.[4]

On January 17, 2018, at Seeboth's preliminary hearing, the court heard Seeboth's suppression motion. During the hearing, Adepoju testified that on October 27, 2014, she was working as a psychiatric technician at CSH and that her duties included conducting patient counts to ensure that all patients were at the hospital and checking on their welfare. During the count, she had to actually physically observe the patients to make sure they were all right.

At approximately 9:05 p.m., she was accompanied by two CSH police officers as she conducted a patient count. At Seeboth's dorm, Adepoju knocked on the door before entering and seeing Seeboth in the back of the room, sitting on his bed wearing headphones with his back to her.[5] As she approached Seeboth, she said "count" but Seeboth did not respond. She moved closer and saw that he was watching something on his laptop. She then saw on the screen arms and legs that appeared to belong to children. Adepoju asked Seeboth what he was watching. Seeboth closed the laptop, removed a small memory card, and broke it in two before throwing it towards the trash. The officers searched the area but only found one piece of the memory card. The officers then confiscated all of Seeboth's electronic storage devices and electronic devices that had storage capacity.

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4 Defense counsel did not challenge the sufficiency of the warrant or its supporting affidavit. Instead he challenged the warrant indirectly when he requested that "all fruits of [the] illegal search and seizure be suppressed as well. (*Wong Sun v. United States* (1963) 371 U.S. 471.)"

5 Four patients lived in each dorm, which is split into four sections. Each of the patient's beds had a privacy curtain. At the preliminary hearing, Adepoju testified that Seeboth's privacy curtain was open enough for Adepoju to see him. However, in a statement to one of the officers she stated that she pushed the privacy curtain to the side before she saw the laptop.

At the conclusion of the hearing, the court denied the motion to suppress and held Seeboth to answer on one count of possession of child pornography with a prior.

On January 19, 2018, the district attorney filed an information charging Seeboth with possession of child pornography with a prior and having five prior strike convictions.

On May 22, 2018, defense counsel filed a motion to dismiss (§ 995) arguing that the case should be dismissed because the court erred in denying the suppression motion.

On May 23, 2018, the court heard and denied Seeboth's *Marsden*[6] motion.

On June 8, 2018, the court denied the motion to dismiss.

On August 16, 2018, Seeboth entered into a plea agreement that provided for a stipulated prison term of eight years.

On September 21, 2018, the court struck four of Seeboth's strike convictions and sentenced him to prison for a doubled middle term of eight years.

On September 25, 2018, Seeboth filed a timely appeal.

DISCUSSION

Seeboth's appellate counsel has filed a brief that summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende*, *supra*, 25 Cal.3d 436.) However, in a letter filed on January 28, 2019, Seeboth appears to contend there was insufficient probable cause for the warrantless seizure of his laptop and other property from his dorm room. He also contends there was insufficient probable cause for the issuance of the search warrant that authorized the search of that property because Adepoju saw only arms and legs on his laptop and she did not see "anyone naked or that anyone was sexual[ly] active, simulated or not." Seeboth further contends defense counsel provided ineffective representation by

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6 *People v. Marsden* (1970) 2 Cal.3d 118.

his failure to obtain the transcript of a hearing on October 6, 2016, or the documents pertaining to that hearing.

Seeboth's ineffective assistance of counsel claim is not cognizable on appeal because it relies on facts outside the record. (*People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534 ["An appellate court's review is limited to consideration of the matters contained in the appellate record."].) Further, Seeboth forfeited his claim that the warrant was not supported by probable cause because he did not raise this theory in the trial court. (*People v. Accredited Surety & Casualty Co.* (2004) 132 Cal.App.4th 1134, 1146 [appellant is precluded from raising a new theory for the first time on appeal].) However, even if his challenge to the warrant were properly before us, we would reject it.

"When an appellate court reviews the validity of a search warrant, 'the magistrate's determination will not be overturned unless the supporting affidavit fails as a matter of law to support the finding of probable cause. [Citations.] Doubtful or marginal cases are resolved in favor of upholding the warrant. [Citations.] The burden is on [the defendant] to establish invalidity of [a] search warrant[ ].' [Citation.] 'The magistrate's determination of probable cause is entitled to deferential review.' [Citation.]

" 'In determining whether an affidavit is supported by probable cause, the magistrate must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit … there is a fair probability that contraband or evidence of a crime will be found in a particular place." [Citation.] The sufficiency of the affidavit must be evaluated in light of the totality of the circumstances. [Citation.]' [Citation.]

" '*Probable cause exists when the information on which the warrant is based is such that a reasonable person would believe that what is being sought will be found in the location to be searched*.' [Citation.] '*Probable cause must attach to each place to be searched*. [Citations.] Thus, an affidavit for a search warrant must contain facts

demonstrating a substantial probability that [contraband or] evidence of a crime will be located in a particular place. [Citations.] A statement that the affiant " 'has cause to suspect and does believe' " that the evidence is located at the targeted premises is insufficient.' [Citation.]

"The affidavit must establish a nexus between the criminal activities and the place to be searched. [Citation.] 'The opinions of an experienced officer may legitimately be considered by the magistrate in making the probable cause determination.' [Citation.] However, an affidavit based on mere suspicion or belief, or stating a conclusion with no supporting facts, is wholly insufficient." (*People v. Garcia* (2003) 111 Cal.App.4th 715, 720–721, italics added.)

The warrant's affidavit of probable cause averred that CHS is a maximum security forensic hospital that houses SVPs, mentally disordered offenders, and mentally disordered sex offenders as well as other prisoners. Officers and staff routinely conduct weekly random contraband searches on patient dorm rooms and common areas and searches can also be initiated based on a reasonable suspicion that contraband is present.

The affidavit also averred that on October 27, 2014, during a patient check an officer heard Adepoju tell Seeboth, "Let me see it." The officer then entered the room and saw Seeboth break something with his hands and took custody of half of a broken memory card that was on Seeboth's bed. Adepoju told the officer that she saw "kids on [Seeboth's] computer screen[.]" Both officers confiscated multiple media storage devices, multimedia players, and a laptop computer.

During a subsequent interview, Adepoju told the officers she saw thumbnail images on Seeboth's laptop that depicted "smallish" body parts, which she believed were children's body parts. Adepoju asked Seeboth, "What is that?" Seeboth replied, "nothing," and immediately began removing items from the laptop. When Adepoju

asked Seeboth to give her an item that was in his hand, he broke the item and threw the pieces toward a trash can.

The affidavit further averred that: (1) a check of Seeboth's criminal history disclosed that Seeboth was a registered sex offender with at least one conviction for annoying or molesting children (§ 647, subd. (a)(1)), lewd and lascivious conduct with a child under the age of 14 (§ 288, subd. (a)) and possession of child pornography (§ 311.2, subd. (a)); (2) patient access to the internet was unlawful; and (3) there was an unlawful modem installed on Seeboth's laptop. We find that the circumstances detailed in the affidavit established far more than a substantial probability that child pornography would be found in the seized material. Accordingly, we reject Seeboth's contention that the warrant was not supported by probable cause.

Moreover, an SVP does not have a reasonable expectation of privacy in his dorm room while confined in a state hospital. (*People v. Golden* (2017) 19 Cal.App.5th 905, 911–912.) Thus, Adepoju and the officers did not violate Seeboth's Fourth Amendment rights when they initially entered into his shared dorm room. Further, the testimony at Seeboth's preliminary hearing established a substantial probability that child pornography would be found in the property seized. Thus, we also reject Seeboth's suggestion that the property from his dorm was seized without probable cause.

Following an independent review of the record, we find that no reasonably arguable factual or legal issues exist.

DISPOSITION

The judgment is affirmed.